90-1970

Supreme Court, U.S.
FILED
MAY 20 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DR. JOAN SILVERBERG LEOPOLD, Petitioner

vs.

INTERNATIONAL COLLEGE, et al., Respondents.

Petition for a Writ of Certiorari to the Supreme Court of California or the Court of Appeal of the State of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

Joan Silverberg Leopold
Petitioner in Propia Persona
P.O. Box 1453
Reseda, California 91337
(818) 342-7591

QUESTIONS PRESENTED

Issue 1: That an arbitration award and judgment thereon may not be used for res judicata or collateral estoppel effect if it is against a clear and definite public policy or statute.

The arbitration award and judgment thereon are against public policy in that they abridge and chill the plaintiff's rights to freedom of speech, freedom of association and the right to petition freely for redress of grievances. They determine that the plaintiff should be penalized for seeking redress of her grievances in all forums available to her as this must have taken her time away from seeking comparable work, as a matter of law, so that plaintiff was denied all salary and benefits after what was determined to be her wrongful termination.

The arbitration award stated (46a hereto): (p. 3) "In view of the fact that Claimant did not make a reasonable effort to obtain a comparable job at the same or better compensation which she

surely could have secured based on her outstanding academic background, but instead chose to turn all of her energies toward pursuing the Respondents in every forum available to her, the damages awarded to her herein are the sums which International College owed to Claimant at the date of her termination plus one month's salary and benefits which will provide for the thirty (30) day notice provision of the contract."

The arbitration award and judgment thereon are also in violation of various statutes, and the public policy clearly reflected in them, including that an employee may not be penalized for pursuing complaints under Federal and other statutory schemes, such as the Equal Employment Opportunity statutes.

Further, an arbitration, particularly where these issues have not been heard, is not an appropriate forum for the determination of these constitutional issues. Such determination in an arbitration should not be given res judicata or

collateral estoppel effect.

Issue 2: The arbitration award and judgment thereon were against public policy, as stated by the highest court of New Mexico, for example, in that they gave effect to a decision in arbitration after the court had made a final, unappealed ruling that arbitration be denied.

Issue 3: The arbitration award and judgment thereon should be denied preclusive effect because due process requirements were not met in the arbitration. For example, the plaintiff was in propia persona and representing herself for the first time in a trial, while the two defendants were represented by three attorneys with long experience in practice.

Issue 4: Because defendant International College (hereafter "College") and its branch Sierra University (hereafter "Sierra") were involved in interstate commerce, and the plaintiff was contracted to perform services in California and New Mexico, the Federal Arbitration Act applies to the arbitration clause in the contract dated

August 20, 1982.

Under the cases interpreting the Federal Arbitration Act, respondents and defendants College and Sierra clearly and explicitly waived arbitration, so that no decision based on arbitration should be determinative of any issues in LASC C 497278.

Issue 5: A court should not be able to deprive a party of their property, deposited with the Marshals office, without due notice and an opportunity to be heard; may not make secret orders, not recorded in the file, which deprive a party of their property; and is not justified in releasing to a party which have never deposited any property under an attachment all the property which another party and third parties have deposited under an attachment, as this deprives those persons of their property without due process and just cause. If such actions are permitted under the California Code of Civil Procedure 488.560(b), then such statute is unconstitutional.

PARTIES

The case below, LASC C 497278, was filed in May 1984 by the attorney for plaintiff.

The parties to the proceedings below are as follows:

Dr. Joan Silverberg Leopold, the plaintiff, is an educator, then in Paris, France, who was hired by College (hereafter "College") as the Director of its Guild of Tutors in Los Angeles, with the option that she be transferred to New Mexico.

The defendants in the original complaint were College, a graduate school recruiting students and faculty from around the world, which turned out to be unaccredited, and Linden Leavitt and Cornelia Leavitt, its chief operating officers.

Other persons were added to the first amended complaint in November 1987, including Sierra University (hereafter "Sierra"), a third party garnishee and former branch of College. Sierra answered the complaint in May 1989.

Previously, in a separate special proceeding,

LASC C 642842, in June 1987, the court had denied [with prejudice] plaintiff's request to compel arbitration, appoint an arbitrator and otherwise use compulsory court processes to further arbitration with College and Sierra under the written employment contract with plaintiff dated August 20, 1982, which contained an arbitration clause. College breached plaintiff's said contract by abolishing the position of Director, Guild of Tutors, on or about September 1, 1983, and demoting plaintiff to the position of Academic Advisor. At the end of 1986, after College had gone out of business, plaintiff obtained in C 497278 an attachment of in excess of $50,000 of College's property to satisfy a future judgment.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	vi
Table of Contents	viii
Table of Authorities	x
Opinions Below	1
Jurisdiction	3
Constitutional and Statutory Provisions Involved	5
Statement of Case	10
Reasons for Allowance of the Writ	23
Conclusion	58
Appendix	
Ruling of April 3, 1989 on International College in trial court	1a
Ruling of June 26, 1989 on Sierra University in trial court	4a

Ruling of June [23-]26, 1989 in attachment department 7a

Ruling of July 7, 1989, filed July 13, 1989, in attachment department 11a

Opinion of the Court of Appeal 15a

Ruling on Petition for Rehearing 35a

Ruling on Petition for Review 36a

Final order denying arbitration, C 642842, June 2, 1987 38a

Arbitration award, June 1988 41a

Confirmation of arbitration award, August 24, 1988 66a

Declaration of Mailing (separate)

TABLE OF AUTHORITIES

CASES

Page

American Postal Workers v. U.S. Postal Service, 682 F.2d 1280 (9th Cir. 1982) . . . 37

Benjamin v. Traffic Exec. Ass'n. etc., 869 F.2d 107 (2d Cir. 1989) . . . 26

CBCO v. Grani Installation, Inc, 95 CA3d 290 (1979) . . . 16-17

C.H.I., Inc. v. Marcus Brothers Textile, Inc., Los Angeles Daily Journal, 90 Daily Appellate Report 4280 (April 17, 1991) (9th Cir.) . . . 45

Caldeira v. County of Kauai, Los Angeles Daily Journal, 89 Daily Appellate Report 1427 (February 3, 1989) (9th Cir.) . . . 45

Carusi v. U.S., 236 F.Supp. 88 (N.J. 1964) . . . 42

Coppinger v. Metro-North Commuter R.R., 861 F.2d 33 (2d Cir. 1988) . . . 26-28

Cunningham v. United States, 549 F.2d 753 (1977) . . . 39-41

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) . . . 24

Fraser v. Merrill Lynch etc., 817 F.2d 250 (4th Cir. 1987) . . . 47-48

Galindo v. Stoody, 793 F.2d 1502 (9th Cir. 1986) . . . 46

Gardner-Denver, 415 U.S. 60 n. 21, quoted in

McDonald. . . . 29

Gilmer v. Interstate/Johnson Lane Corp., Los Angeles Daily Journal, 90 Daily Appellate Report 5501 (May 14, 1991); __ U.S. __ . . . 30

Gilmore v. Shearson/American Exp., Inc., 811 F.2d 108 (2d Cir. 1987) . . . 51-53

Grani Installation, Inc. v. CBCO, Inc., LASC 209213 . . . 16

Hudeck v. Robertson, 210 CA3d 1156 (1989) . . . 17

Local No. P-1236, etc. v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982) . . . 36

McDonald v. West Branch, 466 U.S. 284 (1983) . . . 28-29, 43

McKeague v. U.S., 12 Cl.Ct. 671 (1987) . . . 42

Nat. Foun. for Cancer Res. v. A. G. Edwards & Sons, 821 F.2d 772 (D.C. Cir. 1987) . . . 47-49

Natural Soda etc. v. City of Los Angeles, 109 CA2d 440 (1952) . . . 43

Pantchenko v. C.B. Dodge Co., 581 F.2d 1052 (2d Cir. 1978) . . . 7

Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967) . . . 41, 43

Prudential-Bache Securities, Inc. v. Stevenson, 706 F.Supp. 533 (S.D. Tex. 1989) . . . 54-55

Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) . . . 6-7

Schwartz v. United States, 181 F.Supp. 408, 149 Ct.Cl. 145 (1960) . . . 39-40

Smith v. Petrou, 705 F.Supp. 183 (S.D. N.Y. 1989) . . . 56

Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F.Supp. 1241 (S.D. Fla. 1988) . . . 55

United Nuclear Corp. v. General Atomic Co., 651 P.2d 1277 (N.M. 1982) . . . 44

Urbina v. United States, 428 F.2d at 1287, 192 Ct.Cl. at 886, cited in Cunningham v. United States. . . . 39

Webster v. Doe, ___U.S. ___, 108 S.Ct. 2047, 100 L.Ed. 632 (1988) . . . 26

CONSTITUTIONS

United States

1st Amendment 5 and passim

4th Amendment 5 and passim

9th Amendment 5-6 and passim

10th Amendment 6 and passim

14th Amendment 6 and passim

California

Article I, section 1 7 and passim

Article I, section 3 7 and and passim

Article I, section 7(a) 8 and passim

STATUTES

United States

9 U.S.C. 1 et seq.	iii-iv, 7 and passim
9 U.S.C. 5	15
9 U.S.C. 10(d)	17
28 U.S.C. 1257(3)	4
42 U.S.C. 2000e	6, 35, 38 and passim
Section 704	7
California	
Code of Civil Procedure	
473	18
488.560(b)	iv, 8, 21-22, 56-57
1280-1294.2	7 and passim
1281.6	15
1286.2(d)	17
2018(a)(2)	9, 41-42
Labor Code	
98.6(a)	8-9, 35, 39 and passim
132a	9, 35, 38 and passim

RULES

U.S. Supreme Court	
17.1(b)	4

17.1(c) 4

OPINIONS BELOW

College in LASC C 497278 was granted leave to amend its answer on February 2, 1989 and April 3, 1989 (Appendix on record on appeal, hereafter "A" or "App", Exhs. 25, 43 et seq.), even though 1) the court had already denied arbitration in June 1987 (LASC C 642842, see 38a hereto) and 2) College had waived arbitration of LASC C 497278 and had previously removed the defense of arbitrability from its verified answer (August 1987).

Despite the fact that arbitration had been denied under LASC C 642842, the court at the request of College and Sierra confirmed an arbitration award under that proceeding number. This was despite the fact that College had told the American Arbitration Association that the arbitration was void from the inception after June 1987 and all parties objected to renewed arbitration, which the American Arbitration Association held nonetheless in hearings taking

place among the three parties in December 1987.

An order for summary judgment of dismissal -- with judgment to be entered only at the end of the entire case -- was granted to College in LASC C 497278 on April 3, 1989, based upon res judicata or collateral estoppel from said arbitration. (1a-3a hereto)

The California Court of Appeals considered this order (not judgment) to be an appealable order (A, 2089-90). A judgment of dismissal was granted to Sierra, based upon the April 3, 1989 order, on June 26, 1989. (4a-6a hereto)

An order releasing attached assets of College was made on June 23, 1989, based upon the summary judgment order for College./ (7a-10a) However, it was not entered until June 26, 1989. A changed version of that order was obtained by attorneys for defendants which directed the attached assets to be paid over to Nathan Boatner, attorney and chief executive officer of College, rather than to the parties from whom they had been taken, including plaintiff, as was the default situation

under the California statute. Said changed version of the order was never filed or entered in the case, but was found by plaintiff at the Marshals office in Santa Monica, California. (See augmentation to Appendix to record below made by motion.) Plaintiff objected to such order being made without notice to her and without her knowledge. The order was also improper in that it was never entered or filed. Yet the court refused to set aside such aberrant order or quash its service on the Marshals office in Santa Monica. (11a-14a hereto) Thus plaintiff was deprived of her own property which she had deposited at the Marshals office without due process, notice or a hearing on the merits.

JURISDICTION

The judgments, decrees or appealable orders, reproduced in the Appendix as 1a-14a attached hereto, which petitioner seeks to have reviewed are dated April 3, 1989, June 26, 1989 , June [23-]26, 1989, and July 13, 1991 respectively.

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, which the petitioner seeks to have reviewed is dated December 5, 1990, and is reproduced in the Appendix hereto at 15a-34a.

A rehearing by the California Court of Appeal was denied on January 3, 1991. A petition for review to the California Supreme Court under number S019130 was denied without opinion on February 20, 1991. However, this ruling was not served on the petitioner by the California Supreme Court until after April 15, 1991. (See 35a-36a)

The jurisdiction of the United States Supreme Court is invoked under Section 1257(3) of Title 28 of the United States Code.

Under Supreme Court Rules 17.1(b) and (c): "When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a U.S. court of appeals" or "When a state court or a U.S. court of appeals has decided an important question of federal law which has not

been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court . . .," this important question should be settled by the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by

the people."

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 2000e re EEOC charge: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." [This applies even when one is no longer employed. Rutherford v. American Bank of

Commerce, 565 F.2d 1162 (10th Cir. 1977); Pantchenko v. C.B. Dodge Co., 581 F.2d 1052 (2d Cir. 1978).

Section 704 forbids penalizing a person for resorting to legal procedures established by Congress to rectify congressionally recognized wrongs.]

Federal Arbitration Act, 9 U.S.C. 1 et seq. [too large to reproduce here]

California Arbitration Act, Code of Civil Procedure 1280-1294.2 [too large to reproduce here. Please see statutes.]

California Constitution

Article I, section 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Article I, section 3: "The people have the right to instruct their representatives, petition

government for redress of grievances, and assemble freely to consult for the common good." Article I, section 7(a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws;"

California Code of Civil Procedure section 488.560(b): "Where the property to be released has been taken into custody [by attachment], it shall be released to the person from whom it was taken unless otherwise ordered by the court."

California Labor Code section 98.6(a): "No person shall discharge or in any manner discriminate against any employee because such employee has filed any bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his rights, which are under the jurisdiction of the Labor Commissioner [including Workers Compensation], or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any

rights afforded him."

California Labor Code section 132a: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor . . .

(3) Any employer who discharges or threatens to discharge, or in any manner discriminates against any employee because the employee testified or made known his or her intentions to testify in another employee's case before the appeals board is guilty of a misdemeanor . . ."

California Code of Civil Procedure 2018(a): "It is the policy of the state to: . . . (2) to

prevent attorneys from taking undue advantage of their adversary's industry and efforts."

STATEMENT OF CASE

The issues raised in this petition were not heard in the proceeding to confirm the arbitration award by respondents in LASC C 642842, except for some of those under Issue 3.

The issues were raised by the petitioner in propia persona in LASC C 497278, in which the issue of res judicata or collateral estoppel effect of an arbitration award and judgment thereon in special proceeding C 642842 was brought up by College in February-April 1989, almost two years after the petition to compel arbitration had been denied and College had removed the defense of arbitration from its

verified answer in C 497278.

Based on the granting of the summary judgment motion of College (which the trial court refused to enter as a judgment) (April 3, 1989), summary judgment was then granted to Sierra (June 26, 1989) and the plaintiff's attachment against College was released (June 23-26, 1989 ruling).

Issue 1:

This issue was dealt with in trial court motions, including, but not limited to plaintiff's opposition to the motion of College and then Sierra for summary judgment. Federal cases were also cited. See, for example, A, 1112-19, 1101, 1104, 1142, 1151. It was then presented to the California Court of Appeal in the appellant's opening brief (AOB) and to the California Supreme Court in a petition for review (PR). AOB, 49, 13, 45, 48; PR, 19-20, 27.

Issue 2:

This issue was dealt with in trial court motions, including, but not limited to plaintiff's opposition to the motion of College and then

Sierra for summary judgment. Federal cases were also cited. See, for example, A 1090-94, 1102, 1108-12. It was then presented to the California Court of Appeals in the appellant's opening brief (AOB) and to the California Supreme Court in a petition for review (PR). AOB, 9, 13, 19-20, 31-40; PR, 8, 20-22, 24-27.

Issue 3:

This issue was dealt with in trial court motions, including, but not limited to plaintiff's opposition to the motion of College and then Sierra for summary judgment. Federal cases were also cited. See, for example, A 1104, 1111, 1098 et seq., 1100, 1102, 1109-10, 1153-55. It was then presented to the California Court of Appeals in the appellant's opening brief (AOB) and to the California Supreme Court in a petition for review (PR). AOB, 13, 45, 48; PR, 27-28.

Issue 4:

This issue was dealt with in trial court motions, including, but not limited to plaintiff's opposition to the motion of College and then

Sierra for summary judgment. Federal cases were also cited. See, for example, A, 1089, 1082-84, 855 et seq. It was then presented to the California Court of Appeals in the appellant's opening brief (AOB) and to the California Supreme Court in a petition for review (PR). AOB, 20-21, 24, 11, 13, 15, 18-25; PR, 12-17, 19-20.

Issue 5:

This issue was first brought up in plaintiff's motion to set aside minutes and quash service, on July 7, 1989, as soon as plaintiff learned that service of an unfiled, unentered order, which differed from the order in the file and contained handwritten messages from the Commissioner, had been served by College's chief executive officer Boatner on the Marshals office in Santa Monica, California (A, 2156 et seq.). Federal law on due process was also cited. It was then presented to the California Court of Appeal in the appellant's opening brief (AOB) and to the California Supreme Court in a petition for review (PR). AOB, 15, 52, 54-55; PR, 9, 28-29.

The California Court of Appeal gave the following opinion on the issues for which writ of certiorari is sought here (15a-34a hereto):

Issue 1 here: The court did not address whether the arbitration award and the judgment of confirmation thereon violated public policy and the plaintiff's constitutional rights, or did not fully and adequately provide an occasion for the hearing of constitutional issues, so that any preclusive effect of them, particularly on constitutional issues, would be denied in this case.

Issue 2 here: The court did not address whether allowing res judicata effect to a void arbitration award and judgment thereon was against California or Federal public policy, as it is against New Mexico public policy.

The court did state (24a-25a,p. 7) that the "trial court's order denying Leopold's petition to compel arbitration" [under special proceeding C 642842] did not determine that the matter was not subject to arbitration. The Court of Appeals

said the petition was rejected because it was not brought in a timely manner and including Sierra should be up to the arbitrator [of whom there was then none, and whom the court refused to appoint pursuant to Federal and State statute as the petitioner asked for in her petition].

The Court of Appeal failed to mention that the petition heard on June 2, 1987, did not concern only Sierra, but also College, because petitioner asked for court appointment of an arbitrator, after the previous three had declined to sit, and for procedures to move the arbitration forward with College and Sierra. (See 9 U.S.C. 5 and California Code of Civil Procedure 1281.6 under "Enforcement of Arbitration Agreements".) In its denial of use of court procedures to further arbitration of petitioner with respondents [with prejudice] (38a-40a hereto), the court in C 642842 said that it denied arbitration also because a court action was pending [this case, C 497278], which is valid grounds for denying arbitration. Further, failure to file a petition

to compel in a "timely" manner means that it is already too late to have an arbitration, because arbitration has been waived or for other reasons cannot be enforced.

The plaintiff on appeal cited the trial court opinion in the California case Grani Installation, Inc. v. CBCO, Inc., LASC 209213, at A, 1608-15, which was overturned on appeal (CBCO v. Grani Installation, Inc., 95 CA3d 290 (1979)) on the ground that once compelled arbitration had been denied, no matter for whatever reason, and no appeal was taken, that was a final order in a special proceeding and only a void arbitration and void court confirmation of the award could take place after that on those same issues.

The Court of Appeal's opinion did not deny that the arbitration award was void or that the confirming of the arbitration award was a void judgment. It merely stated (p. 8[25a]) that the issue of whether the arbitration was void for lack of jurisdiction had already been tried in C 642842 by petitioner arguing "that the arbitrator

exceeded her powers and the award cannot be corrected without affecting the merits upon the controversy submitted . . ."

But this is the standard language of California Code of Civil Procedure 1286.2(d), as grounds for vacation of an arbitration award when both the arbitrator and the court have jurisdiction. That is, the arbitrator had "powers" but exceeded them. In our case, neither the arbitrator nor the court had jurisdiction, under the CBCO ruling, so that they had no "powers" and this provision would not even apply. See this distinction in Hudeck v. Robertson, 210 CA3d 1156 (1989).

(This is similarly stated in the Federal Arbitration Act, 9 U.S.C. 10(d), where one of the grounds for the vacation of arbitration awards is: "Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The Act does not state "so that a valid award was not made," but only that a mutual, final, and definite award was not

made. A "valid" or "void" award is a completely different issue.)

The finding of voidness of the court judgment and arbitration award under California law would need to be made under that part of Code of Civil Procedure 473 which reads: [the court] "may, on motion of either party after notice to the other party, set aside any void judgment or order." Such a request was not made under the petition to confirm or vacate the arbitration award under C 642842, and so was not res judicata. Such request would have to be in a separate motion under C.C.P. 473, with a notice of motion stating that it was seeking to set aside a void judgment or order. Further, the cases cited by plaintiff in C 497278 showed that a void award and judgment can be attacked collaterally at any time, even if an appeal of the original order was not heard. (A, 1093)

Issue 3 here: The court did not address this issue in its opinion.

Issue 4 here: The court said (22a , p. 6) that

College's motion(s) to amend its answer(s) to state res judicata based upon an arbitration award and its confirmation "could not have been denied merely because International initially opposed such [arbitration] proceedings." The Appeals Court then went on to conclude that summary judgments for respondents College and Sierra based upon res judicata [including collateral estoppel] were proper (27a-29a, pp. 10-11). The court did not further discuss the issue of waiver of arbitration by respondents' actions in C 642842 [in opposing compelled court processes to further arbitration and therefore denying petitioner the benefit of the arbitration agreement] and in C 497278 [by College filing a cross complaint against plaintiff, removing the defense of arbitration from its verified answer, waiting almost two years before reasserting a defense based upon arbitration or its confirmation, having two summary judgment motions decided on all arbitrable issues, engaging in and compelling discovery from plaintiff on arbitrable

issues by court motion, opposing stay of C 497278 and of discovery in it, and so on].

The court's reasoning that because respondents' "initial" reaction to arbitration was opposing it [which initial reaction continued through the appointment of the arbitrator who heard the case] they had not waived arbitration when it later occurred, does not address the issue, which is waiver by respondents' actions in court, not just in arbitration.

The Federal cases cited here (pp. 50-56), as well as the cases from other states cited in petitioner's previous oppositions and briefs, show that even the "initial" opposition, by opposing a petition to compel arbitration, once this opposition achieves its effect, is sufficient to waive the right to arbitration and, we would say, future use of an arbitration award for preclusive effect. Similarly, College's having summary judgment motions heard in court (October and November 1987), prior to the actual arbitration hearings with College on the

substantive issues which determined the arbitration award (December 1987), reflects an "initial" choice of forum and opposition to arbitration which waives arbitration.

The Court of Appeal's opinion itself quotes the trial court's opinion in C 497278 that the case was "over-litigated" (27a , p. 9). If a case is over-litigated, here, by the respondent College's summary judgment, discovery and other motions, arbitration must thereby be waived.

Issue 5 here: The Court of Appeal apparently did not understand the due process issue raised. It said (p. 31a, 12) that because the judgment in C 642842 was satisfied out of the attachment in C 497278, petitioner had no grounds for asserting harm. However, plaintiff asserted that $1650 of her funds was turned over by her to the Marshals office under the attachment. Under the order releasing the attachment in the court file, this money should have gone back to her under California statute. (C.C.P. 488.560(b)). However, in an undisclosed minute order, never filed and

of which the plaintiff had no notice (nor of the ex parte hearing at which it was made), the court told the Marshals office in Santa Monica, California, to release all attached property to the attorney for College. This was in contradiction to the order of June 26, 1987, which under the California Code of Civil Procedure requires all such attached property, unless otherwise ordered, to be released to the person from whom it was obtained by the marshals. Plaintiff thereby lost $1650, without notice or due process, which the court commissioner found was the proper procedure (A, 2179-80). This has nothing to do with the issue of whether the judgment in C 642842 was satisfied from attached assets of College.

The appeals court upheld this ruling. If C.C.P. 488.560(b) allows an order to release the attached property to a different party to be made without notice and without an opportunity for hearing and without such order even being entered in the files of a court, this statute denies due

process and deprives one of property without a hearing. It should be found unconstitutional.

REASONS FOR ALLOWANCE OF THE WRIT

Issue 1: That an arbitration award and judgment thereon may not be used for res judicata or collateral estoppel effect if it is against a clear and definite public policy or statute.

The arbitration award and judgment thereon are against public policy in that they abridge and chill the plaintiff's rights to freedom of speech, freedom of association and the right to petition freely for redress of grievances. They are also in violation of various statutes, and the public policy clearly reflected in them, that an employee may not be penalized for pursuing complaints under Federal and other statutory schemes, such as the Equal Employment Opportunity statutes.

Further, an arbitration, particularly where these issues have not been heard, is not an appropriate forum for the determination of these constitutional issues. Such determination in an

arbitration should not be given res judicata or collateral estoppel effect.

The Supreme Court in Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222 (1985) found that "We believe that the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest, and that the consequence of this misconception has been the formulation of unnecessarily contorted procedures."

The Federal courts have also held that an arbitral forum, when the parties have not agreed to submit constitutional issues to it, is not an adequate forum for determination of those issues with preclusive effect.

This is because the arbitrator is required to enforce the agreement of the parties, not the laws of the land. These two may contradict each other, in which case the arbitration award cannot be preclusive because it is "against the law."

In the present instance, the arbitrator determined an alleged defense of the respondents,

which was never actually heard with evidence. She determined that plaintiff had been involved in legal proceedings in many different forums with the respondents and so had not been able to look for work. All salary and benefits after termination were therefore denied to plaintiff.

The problem is that this defense involves constitutional issues, of which none of the parties were aware or had notice because 1) no affirmative defenses were given in respondents' answers in arbitration and 2) the issue was never briefed or findings asked for about it by the parties, because they did not know it was an issue and did not intend to present it to the arbitrator, whose jurisdiction they also denied. Since the issue was not actually arbitrated, the arbitrator introduced constitutional elements for the first time in her opinion.

The arbitration award is therefore against the law of the land in that it denies plaintiff a right to seek redress of grievances through the court and other adjudicatory systems, a right to

freedom of speech and association, by penalizing her and allowing the employer to penalize her by taking away her salary and benefits for every hour and minute that she is involved in legal proceedings with the employer so as to obtain her salary and benefits.

This is a non sequitur, circular reasoning, and against well defined and dominant public policy in favor of allowing an employee to seek redress for loss of employment and injury through Governmental means and arbitration, and thereby to seek to mitigate damages.

The Second Circuit also stated: ". . . we perceived in Coppinger that arbitral procedures did not protect constitutional guarantees as adequately as federal court procedures." Benjamin v. Traffic Exec. Ass'n. etc., 869 F.2d 107, 112 (2d Cir. 1989)

In Coppinger v. Metro-North Commuter R.R., 861 F.2d 33, 37 (2d Cir. 1988), the court cited the Supreme Court's 1988 ruling in Webster v. Doe, ___U.S. ___, 108 S.Ct. 2047, 100 L.Ed. 632, that

when Congress' purpose is to preclude judicial review of a constitutional claim it must make its purpose plain. Similarly, if Congress wishes to deny judicial handling to plaintiff's constitutional defense to the affirmative defense of respondents, it must make this plain, which it has not.

The court in Coppinger further pointed out (at 38) that an arbitrator is not normally familiar with complex public policy considerations, may lack authority to apply statutory and constitutional law under the parties' arbitration agreement, and is less protective of individual constitutional guarantees.

"While essential to the smooth functioning of the collective bargaining process, arbitrators are not vested with broad power to apply and interpret the civil rights statutes, much less the United States Constitution." " . . . arbitration by the Board does not sufficiently protect appellant's due process right to have his constitutional claims fully and fairly

adjudicated in a judicial forum."

The court in Coppinger, therefore, denied res judicata effect to the arbitration award in regard to constitutional issues. "There is no indication in the record that appellant's constitutional claims were considered or determined by the Board. Appellant must be permitted to proceed in court." Coppinger, 861 F.2d 39.[1]

Similarly, in McDonald v. West Branch, 466 U.S. 284, 290-91 (1983), the Supreme Court held that in an arbitration, particularly when the employee is represented by a non-lawyer, as plaintiff here in propia persona was, the plaintiff's Federal statutory and constitutional rights are not adequately protected. Allowing such an arbitration preclusive effect would diminish the

[1] As in McDonald v. West Branch, 466 U.S. 284, 285 (1983), this arbitration award, like the present one, was "unappealed." This is here in the sense that the California Court of Appeal never heard an appeal of the award's confirmation, because all the appeals of petitioner regarding the confirmation in C 642842 were dismissed, presumably as untimely. This shows exactly how experienced a litigator the plaintiff was.

protection of Federal rights and cause employees to avoid arbitration. "'Where an arbitral determination gives full consideration to an employee's [statutory or constitutional] rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of [these] claims. It is the duty of courts to assure the full availability of this forum.'" McDonald, and Gardner-Denver, 415 U.S. 60 n. 21, quoted in McDonald, 466 U.S. 291-93, 293 n. 12.

Here, in this case, petitioner/appellant should be permitted to proceed in court, at least on the issue of her constitutional and other defenses to the argument that she failed to seek comparable work because she was involved in legal proceedings with the defendants, if the

defendants can even show (which they have never done) that there was comparable work open and available for her to seek and take.

This constitutional issue was never considered, as shown by the transcript of the arbitration from December 1987, which is contained in the record, by judicial notice from LASC C 642842.

In your most recent opinion on arbitration, yourselves, the Supreme Court have stated, as if this is obvious to all, that employees in arbitration are of course "free" to file other complaints about the circumstances of their employment. "An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." Gilmer v. Interstate/Johnson Lane Corp., Los Angeles Daily Journal, 90 Daily Appellate Report 5501, 5502 (May 14, 1991). [Emphasis added]

However, the arbitration award in this instance, used in LASC C 497278 for res judicata

or collateral estoppel effect on the issue of failure to mitigate damages by seeking comparable work, does deny plaintiff the freedom to file an EEOC charge, because it says this filing is not "free," you must pay with your damages of salary and benefits, in excess of $50,000.

Virtually the only evidence presented by respondents at the arbitration that plaintiff had been pursuing legal matters against them was the attorneys' opening statement that plaintiff had filed an EEOC charge and a Workers Compensation case (the latter through an attorney) and court cases against them, and this was shameless, not that this directly took her time away from looking for work.

The transcript of the arbitration proceedings in December 1987 shows that the attorneys for respondents in their opening statements sought to discriminate against the claimant for her legal proceedings against them and to cause by their arguments the arbitrator also to take action against her.

(A, 1190, lines 1-11): [NATHAN BOATNER FOR COLLEGE]: "The only thing about that settlement and the giving her the $10,343 in money [in Workers Compensation] is that that was the biggest mistake, I think, that International College had made in this whole, sad affair because she saw that as confirmation that her scheme to extort money out of the college was going to work. So she took all of her talents and her mental abiliteies and used them in a shameless and baseless way. She wasted them by devoting her whole life from that point on [summer 1985, when the contract with College was about to expire anyway] pursuing International College, everybody else she could pull into the lawsuit, and people associated with International College that never even heard of her."

(A, 1191, line 1): DR. LEOPOLD: "This isn't a presentation of their case."

(A, 1191, lines 14-25): NATHAN BOATNER [FOR COLLEGE]: "In order to get that $10,343 in the

Workers' Compensation Appeals Board, she had to go to the doctor and be declared to be a paranoid. In order to get her income now, which is said to be SSI, she had to declare herself to be mentally defective, to get SSI, so she could devote heavy income to finance her lifetime pursuit of International College to litigation and other claims. She has filed two lawsuits against International College [LASC C 642842 and C 497278], both on the same set of facts. She's filed this arbitration. She filed a claim with the EOEC, which is Equal Opportunity Employment Commission, claiming sex discrimination. She filed a claim at the Workers' Compensation --"

(A. 1192, lines 1-2) DR. LEOPOLD: "This is still not a presentation of their case."

(A, 1192, line 10): DR. LEOPOLD: "But none of these claims are before you."

(A, 1193, lines 1-25): MR. BOATNER: "The reason I'm saying this is -- I just want to tell you what her resume would show if she made a resume, all of these things that an employer is going to

look at.

THE ARBITRATOR: How does that relate to the incident here?

MR. BOATNER: She's claiming damages that she can't find work. Now --

THE ARBITRATOR: This relates to the damages?

MR. BOATNER: Yes. This is the damages. And I'm saying she hurt herself. Here's what her resume would be at this time. "I'm declared to be a paranoid at the WCAB. I'm declared to be mentally defective at the United State of America SSI. I've been terminated" --

THE REPORTER [=should be DR. LEOPOLD]: Wait a minute. What did you say?

THE ARBITRATOR: Dr. Leopold, I'm going to have to really ask you to quit interrupting. I'm going to stop him when he gets out of line.

DR. LEOPOLD: This is a statement of what he's going to prove in his case?

THE ARBITRATOR: No. This is called opening argument. Attorneys are allowed, and you will be allowed also -- it's a little bit of leeway in

expressing their feelings. It's getting a little out of hand, Mr. Boatner. You can prove to me by presentation of documents what she's claimed ... [etc.]"

No documents regarding an EEOC charge, SSI, or the claimant being declared a paranoid before the WCAB were submitted in evidence in the arbitration.

The time spent in filing and pursuing an EEOC charge and a Workers Compensation case (as well as presumably filing for SSI) is part of a protected activity for which an employer [and an arbitrator who then tells an employer what to do] should not be able to discriminate and retaliate by seeking to deny [and denying] an employee their salary and benefits for failure to mitigate damages during the time spent pursuing those cases. [These cases in fact mitigate damages, because sometimes the amounts awarded to the employee in some of them can be deducted by the employer from damages.]

42 U.S.C. 2000e; California Labor Code 98.6(a),

132a. [quoted under section "Constitutional and Statutory Provisions Involved."]

Another case which shows that the arbitrator's ruling was against clearly defined public policy and should not be given res judicata effect is Local No. P-1236, etc. v. Jones Dairy Farm, 680 F.2d 1142, 1143-45 (7th Cir. 1982). In that case, an arbitrator decided that the company's rule to require employees to report meat adulteration to the company first, rather than to the Government, should be enforced. The plaintiff then had the matter re-heard in court, and the court decision went against the arbitrator's decision. The Court of Appeal determined that the company rule was against public policy and, therefore, the arbitrator's award was not res judicata. The reason that the rule was against public policy was that the court found that the employees had a right to report the adulteration to the Government first if they wished. Similarly, the plaintiff in this case should have been allowed to report her grievances first, second or third

to the Government, in whatever order she chose, in the form of an EEOC charge, Workers Compensation case or court case, if she wished, without penalty. Plaintiff should not be able to be penalized by an arbitrator, by the arbitrator denying damage, because the plaintiff was exercising her right to seek redress through Governmental as well as arbitral means. This point is further made clear by the fact that the Los Angeles Superior Court believed plaintiff's court action was likely to succeed in that it granted an attachment in C 497278 in 1986 against College and considered such attachment to be necessary relief. (A, 1953)

AN ARBITRATION AWARD REQUIRING A PARTY TO VIOLATE THE LAW IS AGAINST PUBLIC POLICY. American Postal Workers v. U.S. Postal Service, 682 F.2d 1280, 1286 (9th Cir. 1982).

This arbitration award requires the employer to discriminate against the employee for spending time pursing legal relief against the employer. This the employer then did, by having the award

confirmed. 42 U.S.C. 2000e; California Labor Code 98.6(a), 132a.

The Federal courts recognize that litigation is a form of mitigation of damages, and can obviate the need to seek comparable work. A reasonable amount of time, even ten full years, may be spent upon it. The arbitrator in the present case never found that the claimant had spent an unreasonable amount of time on litigation, considering the number of proceedings involved.

The Court of Claims found that it was reasonable to spend all one's time on vindicating one's employment rights for ten years if it was necessary to do this because one could not afford an attorney or an attorney would not undertake the considerable amount of work involved. It is even more true in our case, where the plaintiff stated under oath in opposition to motions for summary judgment by respondents that relatives of a member of respondents' Board of Directors had hired her attorney away from her, so that she was unrepresented and had to do the legal work

herself, which was just what respondents (we now see) wanted.

"All of this has taken an enormous amount of plaintiff's time. . . . While for certain periods she was represented by counsel of record, there is reason to believe that plaintiff herself was responsible for virtually all of the paperwork, research, legal strategy, discovery, and presentation at trial. It is questionable whether plaintiff, even if financially able to do so, could have found counsel willing or able to spend the time required to duplicate her own efforts. . . . In Urbina v. United States, supra, it was said 428 F.2d at 1287, 192 Ct.Cl. at 886 of the opinion: "An illegally discharged employee will not be denied his back salary for failure to work during periods when his time is reasonably consumed in prosecuting appeals from such discharge." In Schwartz v. United States, 181 F.Supp. 408, 149 Ct.Cl. 145 (1960), during the period from plaintiff's suspension and [to] subsequent reinstatement plaintiff admittedly

made no effort to secure employment. The court excused him from his failure while he was preparing for his administrative hearing following his suspension and while he was awaiting a decision on his appeal, but not thereafter. It is abundantly clear in the case under consideration that plaintiff was, in fact, fully occupied in the prosecution of her case in this court at least since June 1967. Had she been employed since 1967 she would have been physically unable to perform all the duties the case has entailed. Therefore, from June 1967 to the present time [1977] she is entitled to the back pay for the position from which she was separated, and is exempt from the normal requirement of mitigating damages by seeking gainful employment in that period because she has proven that her time was resasonably consumed in prosecuting her case."

[In the arbitration under this petition, claimant never stated that she did not seek work. She in fact did seek work and was employed during the

period remaining under the contract in question, but her employment never was testified to at the arbitration because respondents had the burden of proving interim earnings and never asked questions about it. In California, the burden of proof would be upon the employer to prove that the claimant had not reasonably sought to mitigate damages and had not reasonably spent her time in prosecuting her cases.] Cunningham v. United States, 549 F.2d 753, 764-65 (1977).

Yourselves, the Supreme Court, have also recognized that pursuing legal proceedings is a form of mitigation of damages. Justice Black wrote that the sponsors of the Federal Arbitration Act recognized the value of arbitration because it could speedily "resolve disputes over performance of contracts and thus mitigate damages and allow the parties to continue performance under the contracts." [emphasis added] Prima Paint v. Flood & Conklin, 388 U.S. 395, 415 (1967).

California's Code of Civil Procedure also

states an explicit and definite public policy that attorneys should not be able to take undue advantage of their adversary's industry and efforts. C.C.P. 2018(a)(2) states in the discovery context what is applicable elsewhere: "It is the policy of the state to . . . prevent attorneys from taking undue advantage of their adversary's industry and efforts." The claim that the industry and efforts of a party such as petitioner are a reason to lower her damages is taking "undue advantage" of petitioner's own industry and efforts.

As a matter of law, undertaking legal work for contractual remedies is a form of working on a contingency basis to obtain the same salary and benefits one would have had under the contract. Therefore, one is not working for less than the contractual amount. An one's expenses are considered business expenses under Federal law: McKeague v. U.S., 12 Cl.Ct. 671 (1987); Carusi v. U.S., 236 F.Supp. 88 (N.J. 1964).

The decision of the California courts in LASC C

497278 and on the appeal flies in the face of the Supreme Court's holding as a matter of public policy in Prima Paint that arbitration [and other seeking of payment for damages] is a form of mitigation and its holding in McDonald that arbitration is an unsuitable forum for preclusive decisions on constitutional rights, particularly when there is no adequate record on this issue and the issue was not specifically addressed by the parties. The California opinion herein also conflicts with the cited cases of the courts of appeal for the Second and Seventh Circuits. It also conflicts with the California Court of Appeal opinion that reasons of justice and policy form an exception to the application of res judicata. Natural Soda etc. v. City of Los Angeles, 109 CA2d 440, 445-46 (1952).

In order that petitioner's substantial constitutional and Federal rights not be trampled upon, the Supreme Court of the United States is asked to consider this issue in a full briefing.

Issue 2: The arbitration award and judgment

thereon were against public policy, as stated by the highest court of New Mexico, for example, in that they gave effect to a decision in arbitration after the court had made a final, unappealed ruling, that arbitration be denied. "The public policy of New Mexico demands that our trial courts enforce final judgments [denying compelled arbitration] instead of overriding those judgments with void arbitration awards." United Nuclear Corp. v. General Atomic Co., 651 P.2d 1277, 1285-87 (N.M. 1982) at A, 1172ff. See 66a-68a, 1a-6a, 15a-34a in appendix hereto.

As stated earlier here (pp. 14 et seq.) the arbitrator and the court in confirming the arbitration award in LASC C 642842 were without [subject matter] jurisdiction. A void arbitration award and judgment cannot have res judicata effect. This would be against public policy and due process. This question may not yet have been decided by the U.S. Supreme Court. However, since there is a conflict between the highest courts of New Mexico and California on this matter, this is

a substantial Federal issue which should be decided by the U.S. Supreme Court.

QUESTIONS OF SUBJECT MATTER JURISDICTION AND DISMISSAL UNDER THE FEDERAL ARBITRATION ACT [IN LASC C 497278] ARE REVIEWED DE NOVO. C.H.I., Inc. v. Marcus Brothers Textile, Inc., Los Angeles Daily Journal, 90 Daily Appellate Report 4280 (April 17, 1991) (9th Cir.)

Issue 3: The arbitration award and judgment thereon should be denied preclusive effect because due process requirements were not met in the arbitration. For example, the plaintiff was in propia persona and representing herself for the first time in a trial, while the defendants were represented by three attorneys with long experience in practice. One of the factors in determining whether there was due process was whether the claimant was "represented by counsel" during the arbitration hearings. Caldeira v. County of Kauai, Los Angeles Daily Journal, 89 Daily Appellate Report 1427, 1430 (February 3, 1989).

The issue of failure to mitigate was not heard with evidence, not briefed, and no findings were asked for about it by the parties in the arbitration. The constitutional issue of whether claimant had a right to or did seek redress in all forums available to her and the amount of time she spent on this was not arbitrated with evidence or briefed, and no findings on it were requested. (A, 1528-1996 and passim) Under Galindo v. Stoody, 793 F.2d 1502, 1512 (9th Cir. 1986), when an issue was not addressed with evidence in an arbitration and was not the focus of the arbitration, the decision on it is not dispositive.

Further, due process was denied because in arbitration affirmative defenses are not usually pleaded in answers. Thus although arbitration had been demanded by claimant in 1984, no formal answers had been filed by respondents, so that claimant had no prior knowledge and also no knowledge at the hearings that failure to mitigate by seeking comparable work was a defense

intended to be used or actually used by the respondents in the arbitration. This is a substantive and procedural issue of due process which can be reviewed de novo by the U.S. Supreme Court. The Federal cases conflict with the California decision here. (See record below.)

Issue 4: Because defendant College and its branch Sierra were involved in interstate commerce, and the plaintiff was contracted to perform services in California and New Mexico, the Federal Arbitration Act applies to the arbitration clause in the contract dated August 20, 1982, if it applies to employment contracts.

Under the cases interpreting the Federal Arbitration Act, as well as state arbitration acts, respondents and defendants College and Sierra clearly and explicitly waived arbitration, so that no decision based on arbitration should be determinative of any issues in LASC C 497278. THE HIGHER COURT CAN REVIEW DE NOVO THE QUESTION OF WAIVER OF ARBITRATION IN CASE LASC C 497278.

The highest court, the Supreme Court, may give

plenary review to the question of waiver of arbitration. Nat. Foun. for Cancer Res. v. A. G. Edwards & Sons, 821 F.2d 772, 774 (D.C. Cir. 1987); Fraser v. Merrill Lynch etc., 817 F.2d 250, 252 (4th Cir. 1987).

Federal cases have held that the filing of a summary judgment motion on arbitrable issues, as was done by College twice, in October and November 1987, waives the right to arbitration. "By filing its summary judgment motion, Edwards [the defendant] submitted NFCR's claims, both the arbitrable and non-arbitrable counts, to the court for resolution on the merits. We conclude that by this point in the pretrial litigation process, at the latest, Edwards had made a conscious decision to exploit the benefits of pretrial discovery and motion practice, with relation to the arbitrable claims, that were fully available to it only in the judicial forum; indeed, Edwards chose to have the substance of NFCR's arbitrable claims decided by a court. This election was wholly inconsistent with an intent

to arbitrate and constituted an abandonment of the right to seek arbitration. . . . To give Edwards a second bite [in arbitration] at the very questions presented to the court for disposition squarely confronts the policy that arbitration may not be used as a strategy to manipulate the legal process." Nat. Foun. for Cancer Res., 821 F.2d 774, 775-77.

College had its first summary judgment motion on arbitrable issues heard and decided on October 5, 1987. It had its second summary judgment motion on arbitrable issues heard and decided on November 23, 1987. It then had the first hearings in arbitration on those same issues beginning on December 7, 1987. Should it be permitted to use the arbitration decision as res judicata, when that decision was based on its impermissible second bite of the apple? Further, it selected its first forum when it told the American Arbitration Association that it wanted to wait until the court decided its summary judgment motions before going through what it contended

was a void arbitration. (See A, 937-939)

The issue of waiver by having summary judgment motions heard on arbitrable issues may be one of first impression in California law. However, petitioner cited numerous Federal and state cases from other states to assist the California court in rendering its decision (for example, the courts of New York and Illinois, A, 979ff., 984ff.). Should the California court be permitted to depart from the example of many other states and the Federal courts, especially when interpreting the Federal Arbitration Act and constitutional rights, in ignoring multiple summary judgment motions and finding arbitration, which had been waived, determinative of the outcome of this case?

The Federal courts have also held that once a party decides to withdraw a motion to compel arbitration, or opposes such a motion, or withdraws the defense of arbitrability from its answer, this is an explicit waiver of arbitration and no showing of prejudice to the opposing party

through the pursuit of court proceedings is necessary.

In Gilmore v. Shearson/American Exp., Inc., 811 F.2d 108, 112 (2d Cir. 1987), the court said: "Whether filing an amended complaint [by plaintiff] affects a defendant's ability to assert again a motion to compel arbitration, which it had voluntarily abandoned with respect to the original complaint, is apparently a question of first impression in this circuit. Although an amended complaint ordinarily supersedes the original pleading [citations], it does not automatically revive all of the defenses and objections that a defendant has waived in response to the original complaint."

"As with the objections listed above, a motion to compel arbitration of a claim involves the core issue of a party's willingness to submit a dispute to judicial resolution and, if waived, is not automatically revived by the submission of an amended complaint [by plaintiff]."

In Gilmore, the defendant withdrew its motion

to compel arbitration. The Second Circuit held that this constituted an "express waiver" of arbitration.

Applicable also to the case at bar is the conclusion of the court in Gilmore that "This policy against permitting a party to play "fast and loose" with the courts [citations omitted], seems particularly applicable here, where Gilmore makes the far from frivolous charge that Shearson's change in position is not merely the product of honest error, but is a tactic in a war of attrition designed to make the litigation too expensive for plaintiff, an elderly clergyman, to continue. [In the present case, plaintiff was an underemployed scholar in propia persona who at the time of College's summary judgment motions and the arbitration hearings was diagnosed with cancer].

Similarly in LASC C 497278, College in August 1987 voluntarily, with leave of court, removed its defense of arbitrability from its first amended answer, filed on October 5, 1987 (A, 859

et seq.). After plaintiff obtained leave to file a first amended complaint in November 1987, amending by adding non-arbitrable causes of action such as fraudulent conveyance or causes of action against persons not parties to the arbitration agreement, College filed an answer still not listing a defense of arbitrability. Only over a year later did College ask for and obtain leave of court twice in 1989 to amend its answer to state defenses based upon another action pending in arbitration/court confirmation and res judicata/collateral estoppel based upon arbitration and confirmation of an arbitration award. Plaintiff objected, just as stated in the Gilmore case above, that College had explicitly waived its defense in its verified answer, and should not be permitted to reinstate such a defense. (A, 857 et seq.) Plaintiff also showed prejudice, which the Gilmore case says it is not necessary to do, in that she believed the matter was being heard in court, she had to spend considerable time and money in replying to the

discovery and summary judgment motions of College in court, and these motions prejudiced her in the arbitration (which was held immediately after the summary judgment motions) because they distracted her attention from it, overburdened her with simultaneous proceedings in court and arbitration when she was being diagnosed as having cancer, led her to believe that only certain defenses were being presented by College, and, further, led the arbitrator to believe that plaintiff was spending all her time in litigation with College and its branch Sierra, so that the arbitrator denied plaintiff all salary and benefits after wrongful termination on the grounds that she could not possibly have sought work because she was in court with these defendants. (A, 868-69, 970 et seq.)

Petitioner documented the time and expenses involved in the court proceedings to show the prejudice to her (A, 589). Further, Federal cases cited by her clearly showed that prejudice, if needed to be proved, may result from duplication

of efforts in court and arbitration, and from the use of discovery methods unavailable in arbitration. (A, 970 et seq., and Prudential-Bache Securities, Inc. v. Stevenson, 706 F.Supp. 533, 535 (S.D. Tex. 1989)). Under Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F.Supp. 1241, 1242 (S.D. Fla. 1988), the court held that "Plaintiffs are correct that all discovery between parties must be stayed by the court pending arbitration." However, even for the period of the arbitration hearings themselves, the court refused to stay discovery at plaintiff's request (A, 133 et seq., 142A et seq., 945 et seq., 969), thus denying plaintiff the benefits of the alleged arbitration agreement. Since this agreement was viewed as unenforceable by the State court, how could it then be used to arrive at an award and judgment which have preclusive effect in State court? This is denying plaintiff both a right to the arbitration agreement and a right to a court trial.

Petitioner also showed that College and Sierra had waived arbitration by opposing on the merits, including on the grounds that petitioner had waived arbitration, petitioner's petition to compel arbitration in April-June 1987, so that compelled arbitration was denied by the court in June 1987.

The court in Smith v. Petrou, 705 F.Supp. 183, 185 (S.D. N.Y. 1989) determined on exactly this same issue, with opposite parties: ". . . plaintiff executed an express waiver by arguing and winning a motion opposing arbitration."

Thus the decision of the California courts in this case is in conflict with at least the U.S. Courts of Appeal of the D.C. and Second Circuits, as well as the highest courts of New York and Illinois. Since this is a substantial Federal issue, which has not been decided by the Supreme Court, we ask that it now be decided under the circumstances of this case.

Issue 5: A court should not be able to deprive a party of their property, voluntarily deposited

with the Marshals office, without due notice and an opportunity to be heard; may not make secret orders, not recorded in the file, which deprive a party of their property; and is not justified in releasing to a party which has never deposited any property under an attachment all the property which another party and third parties have deposited under an attachment, as this deprives those persons of their property without due process and just cause. If such actions are permitted under the California Code of Civil Procedure 488.560(b), then such statute is unconstitutional. [The documents reflecting these actions, including the one <u>not</u> in the court file, added to the record by plaintiff's motion to augment the record on appeal, are in A 1953 et seq. or in the augmented exhibits. The Court of Appeal is being asked to certify the record on appeal and to transmit it to the U.S. Supreme Court.]

CONCLUSION

Wherefore, petitioner/appellant prays:

1. That the United States Supreme Court will reverse the decision of the Court of Appeal and Supreme Court of California affirming the summary judgment orders and judgments granted to International College and Sierra University;

2. That the United States Supreme Court will reverse or modify the other orders subject to review in the attached petition and later brief, as stated in those documents;

3. That the United States Supreme Court will therefore reverse the orders based upon the abovementioned orders, such as the order releasing the attachment in case LASC C 497278;

4. In the alternative to item 3 above, that it the attachment release order in the court file was proper, it be strictly complied with and no other order have any validity, so that the $1650 deposited by the petitioner with the Santa Monica Marshals office be returned to her by the trial court, the Marshals office and/or Nathan Boatner or another agent of International College;

5. In the alternative, that the United States Supreme Court will remand the case to the trial court or the California Court of Appeals for the abovenamed actions;

6. For costs of the petition for certiorari and accompanying papers and for other costs on appeal;

7. For such other and further relief as the United States Supreme Court deems just and proper.

Respectfully requested.

Date: May 19, 1991 Joan Silverberg Leopold

Joan Silverberg Leopold
Petitioner in propia persona

APPENDIX

Nathan Boatner, Attorney At Law

One Wilshire Building, 29th floor

624 South Grand Avenue

Los Angeles, California, 90017

(213) 489-6871

ORIGINAL FILED

APR03 1989

COUNTY CLERK

Attorney for Defendant

International College

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DR. JOAN SILVERBERG LEOPOLD NUMBER C 497278

Plaintiff ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

v

INERNATIONAL COLLEGE, et al

DATE: April 3, 1989

TIME: 9:00 AM

Defendants. PLACE: Dept. 84

A motion having been regularly made by the defendant, International College, herein for summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law,

Now, on considering the declarations, separate statement of undisputed facts, memorandums, the Court files, and all other evidence presented for consideration; and after hearing counsel for the respective parties, and due deliberation having been had, and the decision of the Court having been filed, it is

ORDERED, that said motion be and the same hereby is granted, and that judgment shall be

entered herein in the defendant's favor when final judgment is entered. JZ

DATED APR 03 1989 S/JOHN ZEBROWSKI

JUDGE OF THE SUPERIOR COURT

On: FEB 21 1989

Presented by:

S/Nathan Boatner

Nathan Boatner, Attorney

for International College

Law Offices
Parker and Covert
A Partnership of Professional
Corporations
1901 East Fourth Street - Suite 312
Santa Ana, California 92705
Telephone (714) 973-2137
Spencer E. Covert
Jonathan J. Mott

ORIGINAL FILED
JUL 13 1989
COUNTY CLERK

Attorney for Defendant Sierra University:
A University Without Walls

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JOAN SILVERBERG LEOPOLD, Case No. C 497278

Plaintiff, PROPOSED ORDER

GRANTING

MOTION FOR SUMMARY

v. JUDGMENT

INTERNATIONAL COLLEGE, LINDEN DATE: June 26, 1989

LEAVITT, CORNELIA LEAVITT, TIME: 9:00 a.m.

SIERRA UNIVERSITY: A UNIVERSITY PLACE: 84

WITHOUT WALLS, etc., et al.,

Defendants.

The motion of defendant Sierra University: A University Without Walls for summary judgment dismissing this action on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law came on regularly for hearing on June 26, 1989, in Department 84 of the above-entitled court.

Upon consideration of the memorandum of points and authorities, separate statement of undisputed

facts and supporting evidence, exhibits, the court's files, and all other evidence presented for consideration, and after hearing arugment, and due deliberation having been had;

IT IS HEREBY ORDERED that said motion be and is hereby granted, and that judgment be entered herein in favor of defendant dismissing this action as to defendant Sierra University: A University Without Walls.

DATED: July 13, 1989 S/John Zebrowski

Judge of the Superior Court

Presented By:

S/Jonathan J. Mott

Attorney for Defendant Sierra University: A University Without Walls

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 66

DATE June 26, 1989 HERBERT H. COX/
R. GILLILAND
DEPUTY CLERK

HONORABLE JOE D. OLSON JUDGE PRO TEM

NONE Deputy Sheriff M. SEYMOUR Reporter
(Parties and counsel checked if present)

C 497278

Dr. Joan Silverberg Leopold(X) Pro-Per

vs

International College, et al Nathan Boatner(X)

Sierra University Parker & Covert

NATURE OF PROCEEDINGS	
	The Court grants defendant's motion for reconsideration pursuant to Civil Code of
Defendant's International College, Motion to Strike Undertaking and to Release Attachment and For Reconsideration of Motion to Reduce Attachments	
	Procedure section 1008.(June 12, 1989). Upon reconsideration, of defendant's

motion, the Court makes the following order:

The Court finds the plaintiff is not entitled to the Right to Attach order issued on 12-6-86.

The Right to Attach order issued on 12-6-86 is set aside.

The Writs of Attachment issued herein are quashed. The property levied upon pursuant to the Writs of attachment is released.

The plaintiff filed a purported appeal from the order of the court made on April 3, 1989 granting the motion for summary judgment in favor of

International College and against plaintiff, Joan Silverberg Leopold, but plaintiff failed to file an undertaking in the sum of $102,000.00, within the time prescribed by Section 921, Code of Civil Procedure.

Order	Moving party
Notice	[To be given by] Moving party

MINUTES ENTERED
June 26, 1989
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 66

DATE July 13, 1989 HERBERT H.COX DEPUTY CLERK

HONORABLE JOE D. OLSON JUDGE PRO TEM

NONE Deputy Sheriff REPORTER NONE

(Parties and counsel checked if present)

C 497278

Dr. Joan Silverberg Leopold(X) Pro-Per

vs

International College, et al Nathan Boatner

NATURE OF PROCEEDINGS

Order on Ex Parte Application to set aside minutes and order of purported hearing on June

26, 1989; and to quash service
of same

Through inadvertance this order was not prepared on July 7, 1989. Court orders the following order entered nunc pro tunc as of July 7, 1989

Re Jurisdiction

Parties did not stipulate to a commissioner: Section 482.060 CCP defines the subordinate judicial duties of, here, a commissioner.

The matters ruled upon by commissioner Olson were subordinate judicial proceedings, and no stipulation by the parties was required that the commissioner serve as Judge Pro TEm.

Notice of June 29, 1989

Defendants' motion for Summary Judgment was in department 84, Judge Zebrowski, and any such application/or objection, must be directed to that department.

The matters heard in department 66 were sufficiently noticed, including plaintiff's request for sanctions.

Re Order to Sheriff

The ;order directing the Sheriff to deliver the attached funds to the attorney for the defendants was a routine, non judicial, ex parte order. There is no requirement the money be delivered to a corporate defendant, or that any notice be given of a request to make such an order.

CONTINUED ON PAGE 2

Continued from page one

Re Evidentiary Objections

The matter of the items attached are public records after the Writ of Attachment is ordered.

This Court has no further jurisdiction in this matter. It is on Appeal.

For the above reasons the Ex Parte Application herein is DENIED.

MINUTES ENTERED

July 13, 1989

COUNTY CLERK

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNI

SECOND APPELLATE DISTRICT

DIVISION ONE

JOAN SILVERBERG LEOPOLD, B042092, B044597

Plaintiff and Appellant,

(Super. Ct. No. C 497278)

v.

INTERNATIONAL COLLEGE et al.,

Defendants and Respondents.

COURT OF APPEAL-SECOND DIST.

FILED

DEC 5 - 1990

ROBERT N. WILSON CLERK

DEPUTY CLERK

APPEALS from orders and judgments of the Superior Court of Los Angeles County, John Zebrowski, Judge, and Joe D. Olson, Court Commissioner. Affirmed in part and dismissed in part.

Joan Silverberg Leopold, in pro. per., for Plaintiff and Appellant.

Nathan Boatner, Parker and Covert, Spencer E. Covert, and Jonathan J. Mott for Defendants and Respondents.

In these consolidated appeals, Joan Leopold appeals from the summary judgments entered in favor of International College ("International") and Sierra University ("Sierra," collectively "defendants"),[1] and seeks review of several of

---

[1] Although it appears that judgments were not actually entered, and orders granting summary judgment are not appealable, in the interest of judicial economy, we shall deem the orders

the trial court's orders. We affirm in part and dismiss in part.

BACKGROUND

According to Leopold's original complaint in case number C 497278 against, inter alia, International for breach of contract, bad faith, wrongful discharge, and fraud, filed on May 8, 1984, she was hired by International as Director of the Guild of Tutors on August 20, 1982, and discharged on December 11, 1983.[2] A provision of the written employment contract between International and Leopold stated: "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the then current rules of the American Arbitration Association, and judgment on the award rendered

---

granting summary judgment to be the judgments and reach the merits of these appeals. (See Avila v. Standard Oil Co. (1985) 167 CAl.App.3d 441, 445.)

[2] Sierra was not named as a defendant in this complaint. On November 2, 1987, Leopold filed an amended complaint alleging additional causes of action and naming additional parties, including Sierra.

may be entered in any court having jurisdiction."

3.

On February 24, 1984, Leopold filed a demand for arbitration of her dispute with International. On April 6, 1987, under case number C 642842, Leopold filed a petition to compel Sierra to participate in the arbitration proceedings. This petition was denied by the trial court on June 2, 1987, the trial court indicating that the petition was untimely and "the decision whether to add another party to [the arbitration] proceeding at this stage ought to be the arbitrator's, not this court's."

On January 28, 1988, Leopold filed a second revised demand for arbitration with defendants. The matter was arbitrated with both defendants participating and, on June 24, 1988, the following award was rendered: "International [] and/or []Sierra [] (to the extent monies or property of International [] was transferred to [Sierra]) shall pay [Leopold] the sum of $4,699.28 plus interest of $2,029.12 to the date

of this Award. [ ] The Administrative Fees and expenses of the American Arbitration Association which have been deferred shall be borne equally by the parties and paid as directed by the Association. [ ] The Arbitrator's Fee in this matter is $7,500.00, and will be borne by [Leopold] in the amount of $4,500.00, by International [] in the amount of $1,500.00, and by Sierra [] in the amount of $1,500.00 [ ] This award is in full settlement of all claims (and counterclaims) submitted by either party against the other

in this Arbitration. [ ] Attorney's fees and costs shall be borne by the parties as incurred."[3]

Over Leopold's objection, the trial court confirmed this award in case number C 642842 on August 24, 1988. Leopold filed a notice of appeal

---

[3] On July 19, 1988, the arbitrator clarified the a in the following respect: "Any excess Arbitrator's fees advanced by [defendants] should be offset against any Award to be paid by either or both [defendants] to [Leopold]."

on November 9, 1988. On February 16, 1989, Division Two of this district granted defendants' motion to dismiss the appeal as untimely.

On January 5, 1989, Leopold filed motions in case number C 497278 for relief from a stay which was previously imposed, summary judgment, and summary adjudication of issues. On February 2, 1989, the trial court took these motions off calendar due to defective service.

On or about January 13, 1989, International sought leave to amend its answer to Leopold's first amended complaint in case number C 497278 so as to assert the defense of another action pending. This motion was granted on February 2, 1989.

On February 23, 1989, International again sought leave to amend its answer to Leopold's first amended complaint, this time to assert the defense of res judicata.

Also on February 23, 1989, International moved for summary judgment in case number C 497278 on

the basis of res judicata and collateral estoppel. The trial court granted both of International's motions on April 3, 1989.

On May 30, 1989, Sierra moved for summary judgment in case number C 497278 on the basis of res judicata and collateral estoppel. This motion was granted on June 26, 1989.[4]

DISCUSSION

I

Leopold's first contention on appeal is that the trial court abused its discretion when it twice granted International leave to amend its answer.

Leave to amend pleadings pursuant to Code of Civil Procedure section 473 should be liberally granted and a trial court's decision on such a motion will be upheld on appeal unless a clear abuse of discretion is demonstrated. (Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal.App.3d 898, 914.)

---

[4] Additional facts will be discussed in conjunction with the issues to which they pertain.

Leopold asserts that such an abuse of discretion is demonstrated since International, through its conduct, "waived the recourse of arbitration of this case."

We note that the first amendment to International's answer had nothing to do with the

arbitration proceedings between the parties. The second amendment raised the defense of res judicata which was based on the trial court's final order confirming the arbitrator's award. Although based on the end product of the arbitration proceedings, such an amendment could not have been denied merely because International initially opposed such proceedings. Accordingly, we conclude that Leopold has failed to demonstrate a clear abuse of discretion.

II

Leopold's second contention on appeal is that the trial court abused its discretion when it refused to hear her motions for relief from a stay which was previously imposed, summary

judgment, and summary adjudication of issues.

As previously noted, the trial court placed these motions off calendar due to defective service. Relying on Weil & Brown, California Practice Guide: CIvil Procedure Before Trial (1990) section 9:156, page 9(I)-50, and R & A Vending Services, Inc. v. City of Los Angeles (1985) 172 Cal.App.3d 1188, 1193-1194, Sierra argues that an order taking a motion off calendar is not appealable. However, while such interim orders are not immediately appealable, review may be sought from an ensuing final judgment.

Turning to the merits of this issue, Leopold asserts that the trial court erred in finding that, as a

party to the action, she could not serve notice of these motions since there is no such prohibition when a party personally serves the opposing party's attorney. (Compare Code Civ. Proc., § 1011 [personal service] with §§ 1013 and 1013a [service by mail].)

Even if Leopold's assertion were correct, it would not assist her since, given our holding regarding the propriety of defendants' summary judgment motions, infra, it is clear that Leopold's motions were without merit.

III

Leopold's third contention on appeal is that the arbitration award was void and therefore cannot serve as the basis for res judicata or collateral estoppel. Relying on the trial court's June 2, 1987 order denying her petition to compel Sierra to arbitrate, Leopold argues that the ensuing arbitration proceedings and award were void and therefore may be attacked in a collateral proceeding. Such reliance is misplaced.

Initially, we note that the trial court's order denying Leopold's petition to compel arbitration did not determine that the matter was not subject to arbitration. Rather, the trial court determined that the petition was not brought in a timely manner and that the decision of whether

Sierra should take part in the arbitration proceedings was up to the arbitrator.

Moreover, while it is true that a void judgment may be collaterally attacked, this rule is inapplicable to the case at bench. Here, in her petition to, inter alia, vacate the arbitration award, Leopold challenged the validity of the arbitration proceedings by arguing "that the arbitrator exceeded her powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted . . . ." The trial court rejected Leopold's argument, and the order confirming the arbitration award became final when the Court of Appeal dismissed Leopold's appeal as having been untimely filed. Thus, there has already been a final judicial determination that the arbitration proceedings were valid, and such determination is not subject to relitigation or collateral attack.

IV

Leopold's fourth contention on appeal is that

the trial court abused its discretion by denying her May 9, 1988, March 17, 1989, and May 23, 1989 motions to further amend her first amended complaint, and by taking her March 17, 19898 motion for a severed trial of special defenses off calendar.

The record indicates that on May 27, 1988, the trial court denied Leopold's May 9, 1988 motion for leave to amend wihtout prejudice due to noncompliance with rule 327 of the California Rules of Court and rule 231 of

the Los Angeles Superior Court Law Department Policy Manual. This ruling was not an abuse of discretion.

Regarding Leopold's March 17, 1989 motions for leave to amend and a severed trial of special defenses, on April 3, 1989, the trial court determined that these motions were moot and took these motions off calendar. Given the trial court's determination of International's summary judgment motion, which we affirm, infra,

Leopold's motion for leave to amend was clearly moot, and the trial court was correct in so ruling. Moreover, Leopold was not entitled to a separate trial of the res judicata effect of the judgment in case number C 642842.

As to Leopold's May 23, 1989 motion for leave to amend, the June 30, 1989 minute order indicates the trial court's bases for denying the motion: "Long delay in over-litigated case and lack of merit in proposed amendmnet [sic]." Defective pleading in a proposed amendment and unreasonable delay in seeking to amend a pleading are proper bases for denying a motion to amend. (California Casualty General Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274, 281; Fisher v. Larsen (1982) 138 Cal.App.3d 627, 649; Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 939.)

V

Leopold's fifth contention on appeal is that the trial court erred by granting summary judgments in favor

of defendants.

Relying on Mansdorf v. California Physicians' Service, Inc. (1978) 87 Cal.App.3d 412, 416-417, Leopold argues that an arbitrator may only resolve disputes governed by an arbitration clause and an arbitration award will not preclude a separate trial of cuases of action not subject to arbitration.

However, it is settled that collateral estoppel effect will be given to issues actually determined by an arbitration proceeding (Trollope v. Jeffries (1976) 55 Cal.App.3d 816, 823; compare State Farm Mut. Auto Ins. Co. v. Superior Court (1989) 211 Cal.Ap.3d 5, 14 [same rule applies to judicial arbitrations]), and, upon confirmation, an arbitration award "has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action." (Code Civ. Proc., § 1287.4.)

In the case at bench, the order confirming the arbitrator's award became final upon the dismissal of Leopold's untimely appeal therefrom.

Moreover, as demonstrated in Sierra's separate statement of undisputed facts, seven of the eleven causes of action alleged in Leopold's first amended complaint in case number C 497278 were determined in the arbitration proceedings. The remaining four causes of action, for an alleged conspiracy to conceal assets in an attempt to hinder Leopold's ability to collect any judgment she may receive, was

rendered moot when the judgment in her favor was satisfied from the assets she attached.

Under these circumstances, we conclude that the trial court properly granted summary judgments in defendants' favor.[5]

VI

Leopold's sixth contention on appeal is that

---

[5] Leopold also asserts that the motions for summary judgment were not timely filed. However, Leopold did not challenge the timeliness of defendants' motions at the trial level. "'It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion. [Citations.]'[Citations.]" (Mann v. Cracchiolo (1985) 38 Cal.3d 18, 27.)

the trial court improperly released assets which were previously attached.

Although the record on appeal is very confusing, as best this court can determine, the following events transpired: On December 29, 1986, the trial court issued a writ of attachment in favor of Leopold in case number C 497278. Following its successful motion for summary judgment, on April 5, 1989, International filed a motion to set aside the right to attach order. Sierra joined in the motion. On May 26, 1989, the trial court denied defendants' motion on the basis of a pending appeal from the order confirming the arbitration award in case number C 642842. On May 31, 1989, International filed a motion

to release the attached property. On June 2, 1989, International filed a motion for reconsideration of the order denying the motion to set aside the right to attach order. The motions for reconsideration and release of the

attached property came on for hearing on June 26, 1989, when the trial court granted reconsideration, set aside the right to attach order, quashed the writs of attachment, and ordered the property levied pursuant to the writs of attachment released.

In light of the fact that, through a writ of execution filed on June 23, 1989, the full amount of the judgment in favor of Leopold including applicable interest ($6,124.61) was satisfied out of the proceeds of the levied property, this court cannot discern how Leopold was harmed by the trial court's orders. Accordingly, they will not be set aside.

VII

Leopold's seventh contention on appeal is that the trial court erred in denying her motion for costs.

On July 24, 1989, Leopold filed a memorandum of costs in case number C 497278.[6] The trial court

---

[6] This court is unaware of the amount Leopold sought as costs since the copy of the memorandum of costs contained in Leopold's appendix does not have any amounts listed. However, in

denied costs to Leopold on August 15, 1989.

13.

Code of Civil Procedure section 1032, subdivision (4), provides, in pertinent part: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant."

Although Leopold realized a net recovery in case number C 642842 due to the arbitrator's award, there can be no doubt that defendants, who obtained summary judgments in the instant action, were clearly the prevailing parties. Accordingly, the trial court did not abuse its discretion when

---

light of our determination that Leopold was not the prevailing party in this action, the amount sought is irrelevant.

it denied costs to Leopold in this action.[7]

VIII

Leopold's final contention is that the trial court erred in denying her July 25, 1989 motion for costs in obtaining a garnishee's memorandum pursuant to Code of Civil Procedure section 488.610, subdivision (d). The record on appeal reveals that on August 25, 1989, the trial court denied this motion without prejudice,

14.

deferring consideration of the merits of the motion to a later date. No appeal lies from a post-judgment, interlocutory order such as this, especially when it does not affect the judgment being appealed. Accordingly, we dismiss the appeal from this order.

DISPOSITION

The appeal from the order dated August 25,

---

[7] Even if this court were to consider Leopold's victory in case number C 642842 as being applicable to her memorandum of costs in this action, we note that the amount she recovered was less than the jurisdictional amount of the superior court. This factor alone would justify denying costs to Leopold. (Code Civ. Proc., § 1033, subd. (a).)

1989, is dismissed. The appeals from the summary judgments entered in favor defendants International College and Sierra University, as well as the remaining ordrs under review, are affirmed.

NOT TO BE PUBLISHED.

DEVICH, J.

We concur:

SPENCER, P.J.

ORTEGA, J.

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

ROBERT N. WILSON, CLERK

DIVISION: 1 DATE 01/03/91

JOAN SILVERBERG LEOPOLD

P.O. BOX 1453

RESEDA, CA 91337

RE: LEOPOLD, JOAN SILVERBERG

VS.

INTERNATIONAL COLLEGE

2 CIVIL B042092

LOS ANGELES NO. C497278

THE COURT:

PETITION FOR REHEARING DENIED.

FEB 25 1991

Second Appellate District, Division One, No.
B042092
S019130

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

JOAN SILVERBERG LEOPOLD, Appellant

v.

INTERNATIONAL COLLEGE Et Al.,
Respondents

And Companion Case

SUPREME COURT
FILED
FEB 20 1991
Robert
Wandruff Clerk

DEPUTY

Appellant's petition for review DENIED.

S/LUCAS
Chief Justice

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 82

June 2, 19987

Honorable Miriam Vogel JUDGE K. Kingshill DEPUTY CLERK

M. Seymour Reporter

(Parties and counsel checked if present)

C 642842 In Pro Per

Dr. John [sic] Silverberg Leopold J. Leopold(x)

vs

Sierra University et al A. Pflug(x)

N. Boatner(x)

NATURE OF PROCEEDINGS Petition to compel arbitration denied.

Petition of petitioner It appears to the court that an arbitration is presently pending

before the AAA between the Petitioner and International College. The decision whether to add another party to that proceeding at this stage ought to be the arbitrator's, not this court's. Further, there appears to be another lawsuit pending.

It further appears that the AAA is trying to get the arbitration moving along and that adding Sierra as an additional party at this time is simply going to cause the whole process to come to a screeching halt. Defendants are as entitled to a speedy resolution of the arbitration as is plaintiff, and this request to add another party simply

comes too late.

Responding party's request to dismiss the petition are denied without prejudice. You'll have to do this by noticed motion if you really want to pursue it.

Notice by responding party Pflug.

MINUTES ENTERED

June 2, 1987

COUNTY CLERK

EUGENIA MAXWELL
Arbitrator
1334 Park View Avenue, Suite 100
Manhattan Beach, CA 90266
(213) 372-4838

AMERICAN ARBITRATION ASSOCIATION

Dr. Joan Leopold,
-and-
International College; Sierra University: A University Without Walls: and all related, owned, affiliated, and/or successor entities

Case No. 72 116 0127 84

STATEMENT OF DECISION

After carefully considering the evidence in this case, it is my decision that Claimant is

entitled to the sum of $4,699.28 plus interest of $2029.12 to the date of this award which sum is to be payable by International College or from the funds of Sierra College which were derived from International College and/or University Without Walls.

The evidence supports a finding that International College breached its contract with Claimant when it abolished her position and duties as Dean of Arts and Sciences, reassigned her the title and duties of Academic Advisor and terminated her for habitual neglect of her duties and/or failure to follow a direct order when she failed to perform the reassigned duties.

While it is clear from the evidence that the College, through its President, had the authority to direct the workforce and assign duties and titles as the President saw fit, this right was restricted by the contract which International College

entered into with Claimant by which she was hired

to perform the specific duties of Director, Guild of Tutors/Dean of Arts and Sciences for a period of three years.

Under general contract principles, when International College unilaterally changed Claimant's duties and title to that of Academic Advisor, it prevented the Claimant's performance of the duties for which she contracted. Further, said College improperly terminated Grievant for failing to perform the duties assigned as she had no "duty" as set forth below to perform the inferior duties but could choose not to accept the new position offered by the employer and sue for breach of contract.

Claimant's failure to seek comparable employment, however, affects the measure of damages to which she is entitled. It is well settled that the measure of damages for a breach of an employment contract, is the amount of compensation the employee would have received under the contract less the amount he or she earned or might have earned from other employment

by reasonable effort. While an employee under an employment contract is not under a "duty" to mitigate his or her contract damages failure to do so will affect the measure of damages to which he is entitled. Justice Cardoza has succinctly expressed the reasoning behind this principle as follows:

"The statment is made not infrequently in treatise and decision that a servant wrongfully discharged is "under a duty" to the master to reduce the damages, if he can. The phrase is accurate enough for most purposes, yet susceptible of misunderstanding, if emphasized too sharply. American Law Institute, Tentative Restatement of the Law of Contracts, Section 328. The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this: That if he unreasonably reject, he will not be heard to say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He

has broken the chain of causation and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer." McClelland v. Climax Hosiery Mills, 169 N.E. 605 (1930)

In California, it has been held by the California Supreme Court that an employee need not accept work of a different character or inferior to that type of employment covered by the employment contract. Parker v. Twentieth Century-Fox Film Corp., 3 C.3d 176 (1970). Thus, Claimant was neither required to accept the duties of Academic Advisor offered by the College as this was an inferior position to that of Dean of Arts and Sciences and she was not required to accept lesser employment from another employer in order to reduce her damages. However, Claimant was required to make a good faith effort to obtain other employment which she failed to do and thus should not be allowed to recover damages

for the breach which she could have avoided by a reasonable good faith effort of searching for and obtaining comparable employment. See Stanford Law Review, Vol. 36: 1107, 1155 which discusses this issue.

In view of the fact that Claimant did not make a reasonable effort to obtain a comparable job at the same or better compensation which she surely could have secured based on her outstanding academic background, but instead chose to turn all of her energies toward pursuing the Respondents in every forum available to her, the damages awarded to her herein are the sums which International College owed to Claimant at the date of her termination plus one month's salary and benefits which will provide for the thirty (30) day notice provision of the contract.

As to any other damages claimed for fraud in inducement,

intentional misrepresentation, concealment, promises without intent to perform and negligent

misrepresentation, for breach of a covenant of good faith and fair dealing and related claims, for violation of the provisions cited by Claimant under the Labor Code or for any other causes of action whether stated herein or not, no liability of International College or Sierra College is found as such damages could not have been reasonably foreseen by the Respondents and, in fact, appear to have been caused by Claimant's actions herself. Thus, any damages to Claimant's psyche, her standing in the academic community or her health in addition to those which have already been compensated for by the employer's Workers Compensation settlement in the amount of $10,343.07 must be borne by her and not by the employer.

As to the liability of Sierra University, it is my finding that said entity is not a successor in interest to International College and did not derive any benefits from Claimant's contract but did receive funds belonging to International College and/or University Without Walls which was

a subsidary [sic] of International College and thus Sierra's University's [sic] liability for payment of this award extends to those funds in the event International College is not able to make payment. When a corporation takes all of the property of another corporation without consideration passing to the selling corporation out of which claims of creditors might be satisfied, an obligation to creditors results.

The parties requested that I prepare Findings of Fact and Conclusions of Law which are set forth below. These Findings of Fact and Conclusions of Law are not meant to be all inclusive but are prepared to assist the parties in clearly understanding my statement of the factual and legal basis for my determination of

the principal issues.

Further, if any Finding of Fact is subsequently deemed to be a Conclusion of Law, it is hereby incorporated into the Conclusions of Law. And, if any Conclusion of Law is subsequently deemed to

be a Finding of Fact, it is hereby incorporated into the Findings of Fact.

FINDINGS OF FACT

1. Claimant Dr. Joan Silverberg Leopold was hired by International College on September 1, 1982.

2. Claimant was hired pursuant to a written contract and given a title of "Director, Guild of Tutors."

3. At the time of making the contract, International College operated as an unconventional [sic] institution of higher education. It conducted individualized tutorial programs for adult students rather than formal classroom instruction.

4. International College was, at the time, approved by the State of California but otherwise unaccredited.

5. At the time of making the contract or in negotiations prior to the signing of the contract, Dr. Leopold was advised by Dr. Linden Leavitt, President, that International College was unaccredited and contemplated moving to Santa

Fe, New Mexico in order to facilitate accreditation.

6. The title "Director, Guild of tutors" was subsequently changed by Dr. Leavitt to "Dean, Arts and Sciences" although Dr. Leopold's duties remained the same. While Dr. Leopold assisted in performing some of the Academic Advisor's duties for other employees, she performed the duties of Director, Guild of Tutors/Dean of Arts and Sciences until such time as her title and

duties were changed.

7. On September 6, 1983, International College through its President Linden Leavitt, informed Claimant that her position as Dean of Arts and Sciences was being abolished due to reorganization and that Claimant would be assigned to the position of Academic Advisor with duties dissimilar to that of Dean of Arts and Sciences but at the same salary as indicated in her contract. Claimant was to report to Dr. Marilyn Ravics who had been elevated from the

position of Dean of Behavioral Sciences to Vice President of Academic Affairs rather than to the President.

8. Dr. Leopold, prior to the signing of the contract, had been offered the position of Academic Advisor by Linden Leavitt but had refused that position.

9. On September 8, 1983, Dr. Leopold attended the Board meeting and raised a question regarding her contract stating that she needed to be conslulted regarding the appointment of each new tutor. The Board stated that questions of a legal nature should be referred to the President.

10. After being assigned the duties as Academic Advisor, Dr. Leopold performed some of those duties. but under protest, refused to perform other of the duties stating that her contract did not allow for the reassignment and change in job title, offered her services as a consultant to various committees, signed a supplemental agreement to act in that capacity "under duress" and made a counter offer proposal of her duties

which did not include the duties assigned to an Academic Advisor.

11. On September 23, 1983, Dr. Leopold was advised by her direct superior, Dr. Marilyn Ravics that her services as a consultant

were not needed and that she was an Academic Advisor.

12. Dr. Leopold wrote a memo to Dr. Leavitt on September 26, 1983 asking if Dr. Ravicz was empowered to speak on behalf of the Academic Committee of the Office of the President.

13. On September 29, 1983, Dr. Leopold wrote to Dr. Ravics, stating that the committees had not met and voted on her consultant offer and thus any statement about their request or lack of request of Dr. Leopold's services was premature. Dr. Leopold stated that she had been serving as an Academic Advisor and would continue to fulfill the responsibility of an academic advisor "in so far as these do not conflict with my previous written agreement with the college."

14. Also, on September 29, 1983, Dr. Leavitt advised Dr. Leopold that she had expressely [sic] refused to perform her duties as an employee of International College and, as such, the Coll,ege had no alternative but to give her the notice of termination, effective October 31, 1983. Dr. Leavitt placed Claimant on a 30 day leave of absence with pay beginning October 2, 1983 but stated he would allow her to return if she would agree to perform her duties as sassigned.

15. From October 11, 1983 until October 23, 1983, Dr. Leopold had discussions with Mr. William Ramseyer, Esq. the attorney for International College. Mr. Ramseyer presented Claimant with a supplemental agreement stating that she would perform the duties of Academic Advisor and Dr. Leopold presented counterdemands and another supplemental agreement.

16. On October 31, 1983, Dr. Leopold presented Dr. Leavitt with a counterproposal of her duties which did not include acceptance of the assignment as Academic Advisor.

17. Claimant returned to work on October 31, 1983 and worked November 1, 1983.

18. On November 1, 1983, Dr. Leavitt telephoned Dr. Leopold leaving a message on her telephone that she was to come into the office on Thursday morning to sign the supplemental agreement.

19. On November 2, 1983, Dr. Leopold wrote to Dr. Leavitt stating that unless he defined her duties, she would assume that there were no assignments at present.

20. On November 2, 1983, Dr. Leopold presented a Memorandum to the Board of Directors asking the Board to consider her treatment under the contract.

21. On November 3, 1983, the Board moved that an ad hoc personnel committee consisting of the chair and one other board member be set up to hear the position of Joan Leopold. No committee was apparently formed in accordance with this motion.

22. On November 22, 1983 Dr. Leopold came to Dr.

Leavitts's office and signed the supplemental agreement prepared by Mr. Ramseyer with the words "under duress" under her signature.

23. On November 22, 1983, Dr. Leavitt sent a memorandum to all staff indicating that Claimant would be returning to work under the direction of Dr. Ravicz as an Academic Advisor. The College also advertised in their International Newsletter that Dr. Leopold was now an Academic Advisor.

24. Dr. Leavitt discovered the words "under duress" on or about December 8, 1983 and presented Dr. Leopold with a statement on December 9 and instructed her to contact him within 24 hours to indicate her response to his request that she sign a statement. Dr. Leavitt's memorandum stated that her failure to respond within 24 hours would result in termination from International

College.

25. On December 11, 1983, Dr. Leavitt sent a letter to Dr. Leopold stating that he had not

heard from her in response to his December 9th letter and that therefore she was terminated effective the date of the letter or December 11, 1983.

26. On December 20, 1983, Dr. Leavitt received a mailgram from Dr. Leopold dated December 9, 1983 which referred him to her November 2, 1983 memorandum to the Board of Directors, and stated, "threat of termination is duress - voluntary agreement to follow." No agreement was submitted.

27. On or about December 21, 1983, International College submitted a final paycheck of $2037.98 consisting of unpaid vacation and two weeks severance pay to Dr. Leopold. This check was returned to the College by Dr. Leopold.

28. Claimant received a settlement of $10,343.07 on April 18, 1985 in a Worker's Compensation Case arising out of her employment and signed a release waiving the provisions of Civil Code Section 1532.

29. Comparable salaries for Dean of Arts and Sciences presented by Claimant indicated salaries

comparable to those earned by Claimant or substantially higher than the amount of the salary paid to Claimant by Respondent.

30. Sierra University was incorporated in 1985 when the assets of International College were purchased by William Lyon without any of the liabilities passing to the purchaser. Monies belonging to International College and/ or University Without Walls passed to Sierra University.

31. The contract in dispute herein contained an arbitration clause pursuant to which the matter was heard by the undersigned

10

Arbitrator.

CONCLUSIONS OF LAW

1. The contract entered into by Dr. Joan Leopold and International College provided that Dr. Leopold would perform the duties of Director, Guild of Tutors/Dean, Arts and Sciences for a period of three years. The Description of Duties and Responsibilities were incorporated into the

contract by reference.

2. The International College Personnel Policies and Procedures Manual was not incorporated into the contract except in reference to Paragraph 4 of the contract relating to benefits.

3. International College breached its agreement with Dr. Joan Leopold when it abolished her position as Dean, Arts and Sciences and reassigned her the title and duties of Academic Advisor and improperly terminated her for habitually neglecting her duties and/or failing to follow a direct order.

4. Claimant did not willfully breach the contract or voluntarily disable herself by refusing to perform her duties and/or habitually neglecting to perform her duties and/or abandoning her employment as she was hired to perform the duties of Director, Guild of Tutors/Dean of Arts and Sciences but was prevented from performing those duties by International College.

5. Claimant was not under a "duty" to accept the position offered to her by International College

or to seek comparable employment, however the measure of her damages is to be limited due to her failure to seek comparable employment.

6. The measure of damages for said breach is the amount Claimant would have received under the contract less the amount she earned

11

or might have earned from other employment by reasonable effort. These damages are as follows:

Pay and benefits for Thirty (30) days notice period - Final notice of termination not until December 11, 1983. This supercedes termination pay set forth in Personnel Policy which provisions was not incorporated into contract

$3,251.28

Amount due and owing to Claimant at time of discharge - $2037.98 less termination pay of $1,061.54 plus deductions from gross pay

$1448.00

Total	$4699.28
Plus interest at the legal rate of interest from December 11, 1983 to date of award	2029.12
Total damages	$6728.40

7. The breach of contract by International College was not a proximate nor foreseeable cause of any damages occurring to Claimant other than as set forth above.

8. Neither International College nor Sierra University nor any of its officers or employees wilfully misrepresented to Claimant that International College was accreditated [sic] or misrepresented any other material facts either past or present with an intent to deceive or an intent not to perform nor did they wilfully take any actions in bad faith to injure Claimant.

9. The contract and the relationship between Claimant and International College was not one of such long duration as to support a claim of an Implied in Law Covenant of Good Faith and Fair

Dealing and Claimant's discharge was not an action by International College which violated public policy.

10. The evidence does not support a finding that Claimant's prestige was lost by International College's action of publishing the International Newsletter indicating that she was acting in the position of Academic Advisor or that her academic standing

was damaged by working for or being terminated by International College.

11. Neither International College nor Sierra University nor any of its officers or agents misrepresented any material facts or took any actions either willfully or negligently which would subject them to a claim of Fraud in Inducement, Intentional Misrepresentation, Concealment, Promises Without Intent to Perform or Negligent Misrepresentation.

12. Neither International College and/or Sierra University is liable to Claimant for Breach of

Implied Covenant of Good Faith and Fair Dealing, Fraud, Intentional and/or Negligent Infliction of Emotional Distress or Interference with Contractual Relations or any other causes of action claimed by Claimant whether included in these Conclusions of Law or not either by its original actions or by any actions in connection with the American Arbitration Association rules and violations of the agreement to arbitrate.

13. The issue of such liability was not conceded by International College when it entered into a stipulation of judgment in connection with an overall settlement offer which did not materialize.

14. It is my opinion that I do not have jurisdiction as arbitrator to determine a claim of false solicitation of employee pursuant to Labor Code Sections 9670-972 [sic] and related sections and/or penalties for non payment of wages pursuant to Labor Code 201 et. seq. under the authority of the Federal Arbitration Statutes as this is a determination for another forum.

However, if jurisdiction be found, I make the finding that the evidence does not support a finding of false solicition [sic] of employment nor

violation of any of the Labor Code sections for penalties for non payment of wages.

15. No sanctions should be imposed upon Mr. Alfred Klein, Esq. for attempting to influence the Arbitrator, Ms. Sara Adler, by direct communications with her and/or for using such communication to cause the arbitrator to withdraw as the evidence was insufficient to support a finding in that regard.

16. Claimant's executed Release of All Claims in connection with the Worker's Compensation Settlement dated April 18, 1985 did not extend to all claims in this action as that release was intended to be part of an all inclusive settlement in all matters that was not effectuated.

17. Claimant was not required to accept the

position of Academic Advisor or to accept other employment of a lesser nature than that for which she contracted. However, Claimant did not make a reasonable effort to find other employment and thus her damages should be limited to the amount she would have earned with International College less the amount she would have earned had she made reasonable effort to and did secure a position which was comparable to that of Dean of Arts and Sciences.

18. Any other damages claimed by Claimant should be borne by her and not by Respondents as those damages were not foreseeable by the Respondents and thus were not the proximate cause of the breach but were in fact caused by Claimant herself.

19. Sierra University is not a successor in interest to International College. However, funds belonging to International College or University Without Walls were transferred to Sierra University and thus Sierra University is obligated to pay this award from those sums

transferred if in fact International

College is unable to make payment.

Dated June 24, 1988 S/Eugenia B. Maxwell

Arbitrator

Nathan Boatner, Attorney At Law
One Wilshire Building, 29th Floor
624 South Grand Avenue
Los Angeles, California 90017
(213) 489-6871

FILED
AUG 24 1988
FRANK S. ZOLIN, COUNTY CLERK
BY CONNIE L. HUDSON
DEPUTY

Attorney For Defendant
International College

S/CONNIE L. HUDSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DR JOAN SILVERBERG LEOPOLD

Petitioner

v

SIERRA UNIVERSITY, et al

NUMBER C 642 842

ORDER AND JUDGMENT

DATE: August 24, 1988

TIME: 9:00 AM

Respondents PLACE: Department 82

Respondent, International College, having moved for an order confirming the award made by Eugenia B Maxwell, arbitrator selected pursuant to the rules of the American Arbitration Associaton [sic]; and upon the moving papers, declarations, and exhibits in support of and in opposition to said motion to confirm, due deliberation having been had thereon and the decision of the Court having been filed, it is

ORDERED, that the said motion to confirm the arbitrator's award is hereby granted; and that the arbitrator's award be and the same hereby is confirmed; and it is further

ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of Joan Silverberg Leopold and against International College for the total sum of $5,728.40, without interest, each party to bear their own costs and attorney fees.

DATED 8/24/88 S/ DZINTRA JANAVS

JUDGE OF THE SUPERIOR COURT

On: AUG 15 1988

Presented By:

S/Nathan Boatner

Nathan Boatner, Attorney

for International College